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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,

Petitioner,

v.

C. W. MOORE, *et al*,

Respondents.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky (R. 25-34), is reported at 356 S.W.2d 241. The Orders and opinion of the Jefferson Circuit Court, Chancery Branch, First Division (R. 17-19, 22), are unreported.

JURISDICTION

The judgment and order of the Kentucky Court of Appeals was entered on February 13, 1962 (R. 24-35), and a Petition for Rehearing was denied on May 4, 1962 (R. 35), making such judgment final. On July 17, 1962, Mr. Justice Stewart entered an Order extending to September 4, 1962 the Petitioner's time for the filing of the Petition for a Writ of Certiorari (R. 62-63). The Court granted the Petition on January 21, 1963 (R. 63-64).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. § 136, 29 U.S.C. § 141, et seq., are as follows:

SEC. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder • • •

SEC. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

SEC. 203(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement • • •

SEC. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

QUESTIONS PRESENTED

1. Whether a court may, consistent with federal law, set aside an interpretation of a collective bargaining agreement rendered by a Committee composed of representatives of the contracting parties, whose decisions are designated by said agreement as being final and binding, on the ground that in the court's own judgment as to the scope, coverage and meaning of the contract in question the dispute was not properly before the Committee.

2. Whether federal law permits judicial interference with an agreement of the parties made through the afore-mentioned Committee, which calls for the dovetailing (merging) of seniority of employees of two companies that are members of a multi-employer bargaining unit upon the absorption of the operation of one such company by the other.

3. Whether a court may, consistent with federal law, set aside the decision of the Committee because, in its view of the merits of the dispute, the decision was erroneous.

4. Whether the complaint contained sufficient allegations to give rise to an issue as to whether the Union had breached its duty of fair representation and, if so, whether a breach of such duty had been proved in the instant case.

5. Whether individual employees within the bargaining unit have standing to contend in the courts that the aforesaid decision to dovetail seniority constituted a breach of the collective agreement, where the agreement reserves the handling of grievances and the interpretation of its substantive provisions to the exclusive authority of the Union and the Employer.

STATEMENT

A. The Facts

The petitioner (defendant-appellee below), General Drivers, Warehousemen and Helpers, Local Union No. 89, (hereafter referred to as "Local 89"), is an unincorporated

association and labor organization representing employees for the purpose of collective bargaining and is affiliated with the National Truckaway and Driveaway Conference (hereafter called the "National Conference") and with the International Brotherhood of Teamsters. (R. 1-2, 45, 54).

Dealers Transport Company (hereafter called "Dealers"), also a defendant-appellee below, is a corporation of the State of Tennessee, having offices at Louisville, Kentucky, and operating a trucking business primarily throughout the southern portion of the United States. (R. 2, 42). E & L Transport Company (hereafter called "E & L"), not a party to these proceedings, is a Michigan corporation having offices at Louisville, Kentucky, and operating a trucking business there and in other parts of the United States (R. 2, 42). Respondents here, plaintiffs-appellants below, as a class, are employees of Dealers and members of Local 89. (R. 1, 39).

Local 89 has for many years represented the employees of both Dealers and E & L and other companies, all of whom are members of a multi-employer, multi-local union bargaining unit (R. 13, 39, 51-52, 54). Identical contracts between the employers and the unions are negotiated and concluded on behalf of the unions by the National Conference, and on behalf of the employers by the Automobile Transporters Labor Division. (R. 8-14, 39, 51-52). The current agreement, known as the "Automobile Carrier Truckaway Agreement," covers the period of March 1, 1961 through February 29, 1964 (R. 2, 8). Both Dealers and E & L are signatories to the Agreement. (R. 51-52).

The said Agreement provides, in Article 1, Section 1, that the employer recognizes the National Conference, on behalf of its member locals, as the exclusive representative of all employees. (R. 9). Under Article 38, the employer "agrees to be bound by all of the terms and provisions of this Agreement, and . . . by the interpretations and enforcement of the Agreement." (R. 13). He also agrees "to be-

come a part of the multi-employer unit set forth in the Agreement." (R. 13).

Article 4, Section 1 establishes the principle that "seniority rights for employees shall prevail," provides for the posting of seniority lists, and states: "Any controversy over the employees' standing on such lists shall be submitted to the joint grievance procedure (ARTICLE 7)" (R. 9). Section 5 of Article 4 provides as follows:

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. (Article 7). (R. 10).

Article 6 establishes a Local Joint Committee and a Joint Conference Committee, each composed of an equal number of union and employer representatives, for the purpose of settling contract disputes "which cannot be settled by the Employer and the Local Union. . . ." (R. 10-11, 40). Article 7, Section 1, states:

> The Unions and the Employers agree that there shall be no strike, tie-up of equipment, slow-downs or walkouts on the part of the employees, nor shall the Employer use any method of lock-out or legal proceeding without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. (R. 11).

The grievance procedure calls for the following steps: Initial discussion between the employer and union, followed by submission to the Local Joint Committee, appeal to the Joint Conference Committee and, finally, submission to an impartial board of arbitration. (R. 11-12). It is further provided, in Section 2(d), that "all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the . . . Joint Conference Committee." (R. 12). Sections 2(e) and (f) provide that "any decision of the . . .

Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved,"[1] (R. 12), it being "the intention of the parties to resolve all questions of interpretation by mutual agreement." (R. 13).

The principal business of both Dealers and E & L in Louisville was carrying automobiles for the Ford Motor Company. (R. 41). In 1961, due mainly to increased "piggyback" activity by the railroads, Ford informed these companies that only one of them was needed to carry on the operation without indicating which company was to stay. (R. 41-42). Accordingly, Dealers and E & L agreed that Dealers would purchase E & L's "secondary authority" in the South, and E & L in turn would purchase Dealers' "initial authority" out of Lorraine, Ohio along with certain physical assets there. Thus, each company would consolidate its operations geographically. (R. 39, 42-43, 53). To accomplish these objectives, the companies filed applications with the ICC. (R. 42-43, 53).[2]

However, the true nature of these transactions was not revealed to the Union or the employees involved (R. 47, 49, 57). For some time prior to August, rumors were rampant that Ford had ordered the cessation of E & L's operations. (R. 50). Paul Priddy, President of Local 89, instructed his assistant, Leslie Atterbury, to determine whether the proposed arrangement was to be "a sale, merger, trade or whatever it might be." (R. 57). Atterbury was told by officials of both companies that "there was no kind of a trade, understanding at all, between management of the two companies" and that Ford "had seen fit to take the business from one carrier and give it to another carrier." (R. 47, 57). With this "current available information" in mind, Priddy and Atterbury told the E & L employees that they had bet-

[1] With regard to the finality and binding effect of grievance decisions, this contract is more explicit than was the contract before this Court in *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918 (1963).

[2] Subsequently, the applications were approved by the ICC. 87 MCC 785 (Dec. 29, 1961).

ter look for other jobs and Atterbury assured the Dealers employees that they had nothing to worry about. (R. 45-47, 49, 57).

In August, 1961, however, in the light of continuing speculation about a deal between Dealers and E & L and as the layoffs at E & L accelerated, the E & L employees filed a grievance claiming that pursuant to Article 4, Section 5 of the collective bargaining agreement, *supra*, they were entitled to be employed by Dealers while retaining the seniority status they had enjoyed at E & L (R. 2-3, 37, 55). In short, the gist of their grievance was that upon the consummation of the current transactions involving the two companies the seniority boards of both should be merged.[1]

Local 89 carried the grievance to the Local Joint Committee where, pursuant to Article 7, Section 2(d) (R. 48), the matter was "deadlocked" by unanimous vote for submission to the Joint Conference Committee (R. 48-49, 55-56). By this time, Local 89 had knowledge of Dealers' application to the ICC to obtain E & L's secondary authority out of Louisville, but remained unaware of the agreement that had been reached between the two companies. (R. 47, 49-50, 57).

On October 18, 1961, the grievance came before the Joint Conference Committee in Detroit (R. 3, 59). The Dealers employees were represented in Detroit by three union shop stewards, who had been elected to their posts by the Dealers employees and who made the trip at the Union's expense (R. 36-40, 49,54). Shortly before the hearing, Paul Priddy informed these shop stewards that on the basis of information indicating an arrangement between Dealers and E & L he favored the dovetailing of seniority as between the two groups of employees involved (R. 56). Priddy, ordinarily a member of the Committee, withdrew from the panel and did not participate in the decision pursuant to an "automatic" rule of the Committee requir-

[1] This process, whereby the seniority of separate groups of employees is merged on a single list, is commonly known as "dovetailing" of seniority.

ing such withdrawal by any member who wishes to argue to the Committee or within whose jurisdiction the grievance arose. (R. 50-51, 56, 58).

At the start of the hearing, Mr. Priddy presented the facts to the Committee and recommended that the seniority lists be dovetailed, pointing out that such action would in the long-run aid the larger part of the working force, including the Dealers employees who stood to be hurt at present (R. 57-58). He noted that since E & L's operation was to be taken over by Dealers, the employees of the former, under the proposed dovetailing arrangement, would in effect be "following their work." (R. 57-58). On the other hand, said Priddy, if such arrangement were not adopted, the E & L employees—most of whom had greater seniority than the Dealers employees—would either lose their jobs or go to the bottom of the list at Dealers, thus losing credit for many years of service within the multi-employer, multi-local union bargaining unit (R. 57-59).[4] Mack Snites, Dealers' Vice-President and General Manager, also made a statement to the Committee, outlining the details of the Dealers— E & L agreement and admitting frankly that Dealers had "absorbed a certain portion" of E & L's business. (R. 44, 58). The Dealers shop stewards spoke up for their cause, making no allegations as to inadequate representation. (R. 37-40, 51).

Thereafter, the Joint Conference Committee issued a unanimous decision, ordering the merger of seniority boards of Dealers and E & L within thirty days. (R. 3-4, 59-60). Following the decision, and during the trial below, Dealers began to comply with the award while E & L con-

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[4] During trial below, Priddy testified that his position before the Committee was in no way motivated by prejudice for or against either faction of employees and would have been the same "had the other company been the successful one to stay." (R. 58). He conceived it to be the duty of the Union, representing the employees of both companies "to protect people in spite of themselves." (R. 58-59).

tinued to operate in Louisville with 25 to 30 men—pending decision on their applications to the ICC. (R. 44-45, 61).*

B. Proceedings Below

On November 8, 1961, C. W. Moore, an employee of Dealers, instituted a class suit for himself and about 300 other employees similarly situated against Local 89, the International Brotherhood of Teamsters, and Dealers in the Jefferson Circuit Court, Chancery Branch, First Division in Kentucky. (R. 1-8). By amended complaint, representatives of the E & L employees (petitioners in Case No. 17 were added as defendants. (R. 15). Count I of the complaint alleged that plaintiffs had relied on the union to present their case through the grievance process; that the union had deceived them and failed to represent them; that the decision of the Joint Conference Committee was "contrived" by the union; that the said decision was arbitrary and capricious and in violation of the collective bargaining agreement; and that plaintiffs, having lesser overall seniority than E & L employees, were being deprived of their jobs by the decision. Accordingly, Count I sought to enjoin implementation of the Committee's ruling by Dealers and the Union. Count II repeated the above and, as an alternative to injunction, sought damages in the amount of $6,625,000. (R. 1-8).

Defendants Local 89 (petitioner here) and E & L employees moved to dismiss the complaint for its failure to state a cause of action (R. 16, 21). Local 89 also moved for dismissal on the ground of NLRB preemption of jurisdiction (R. 21).

After hearings held in November and December, the court denied plaintiffs' motions for a temporary and a permanent injunction and granted the motions to dismiss

* It was assumed that, pursuant to the Committee award, E & L would in turn employ the Dealers employees at Lorraine, Ohio, on the basis of the same seniority arrangement. (R. 43-44).

(R. 17-19, 22).[6] The court observed that no contention had been made that the facts surrounding the "absorption" had not been truthfully disclosed to the Committee. (R. 18). It further observed that "there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented." (R. 18-19). The court agreed with the Committee that "the provisions of Article 4, Section 5 . . . governed this state of facts" and concluded that "a binding determination of the controversy was made in Detroit on October 18, 1961." (R. 19).

Upon plaintiffs' appeal to the Kentucky Court of Appeals, that court, on December 15, ordered the submission of the case on the record and briefs and immediately reversed the decision of the trial court,[7] noting that an opinion would be rendered later. (R. 19-20, 23, 24-25). The opinion of the Court, rendered February 13, 1962, was as follows: First, the Court stated that the Committee's interpretation of Article 4, Section 5 was erroneous in that the provision "deals only with seniority, and not with initial employment." In short, it does not become applicable "unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed." (R. 30-31). Furthermore, said the Court, even though the contracts signed by Dealers and E & L are identical, "still they are separate agreements" and the E & L employees can claim no benefits or rights under the Dealers contract. (R. 31). For these reasons, "the question was not arbitrable under the grievance procedure." (R. 31). Second, the Court stated that "two antagonistic interests were represented by the same advocate at Detroit" and "this of itself is enough to destroy the tradi-

[6] Also granted was defendant International's motion to dismiss as to itself (R. 17).

[7] It did, however, uphold the dismissal of the complaint as to the International because of its insufficient "connection with the controversy." (R. 29-30, 34-35).

tional presumption in favor of an arbitration award." (R. 32). The Court further noted that "the influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines." (R. 32). The Court concluded: "When we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice." (R. 32-33). Two judges dissented without opinion. (R. 34). On May 4, 1962, the Court denied Petitioner's petition for rehearing. (R. 35).

SUMMARY OF ARGUMENT

I

The instant case arises under Section 301 of the Labor Management Relations Act. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Drivers Union* v. *Riss & Co.*; 9 L. Ed. 2d 918 (1963). Therefore the state courts had jurisdiction but were bound to apply federal law. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Dowd Box Co.*, v. *Courtney*, 368 U.S. 502 (1962); *Smith* v. *Evening News Assn.*, 371 U.S. 195, 9 L. Ed. 2d 246 (1962).

The federal law governing the case includes principles relative to multi-employer, multi-union bargaining units, the dovetailing of seniority, the union's duty of fair representation, and the relationship of union and individual rights under collective bargaining agreements, all of which, "taken together, shape the national labor policy". *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962).

As will be hereafter developed, the decision rendered by the Joint Conference Committee in the instant case could be viewed either as an agreement between the contracting parties pursuant to negotiations or simply as a grievance award, similar to arbitration, rendered pursuant to the

grievance procedure of the contract. Upon either view, however, the principles of Section 301 must be brought to bear, and the decision of the Committee to dovetail seniority should be upheld within the framework of applicable federal labor laws.

II

The court below was in error in holding, on the basis of its own interpretation of the contract, that the dispute was not properly before the Committee.

1. The national labor policy concerning the settlement of contractual disputes "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Accordingly, when the parties have agreed upon a method of settlement of disputes and have further agreed to utilize the prescribed method for the resolution of all such disputes, the courts have been admonished not to interfere beyond making a determination as to whether the dispute is "on its face . . . governed by the contract." *United Steelworkers* v. *American Mfg. Co.*, *supra*, at 568; see also *United Steelworkers* v. *Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960); *Drivers Union* v. *Riss and Co.*, 9 L. Ed. 2d 918, 920 (1963).

The desire of the parties in this case was expressed very clearly. They agreed to submit "any controversy" over seniority "to the joint grievance procedure." (R. 9; Art. 4, Sec. 1). They agreed to desist from using self-help methods "without first using all possible means of settlement . . . of any controversy which might arise." (R. 11; Art. 7, Sec. 1). The contract provided that "all matters pertaining to the interpretation of any provision . . . must be submitted to the . . . Joint Conference Committee" (R. 12, Art. 7, Sec. 2(d)), whose decision "shall be final and conclusive and binding upon the Employer and the Union and the employees involved." (R. 12; Art. 7, Sec. 2(e)).

Article 4, Sec. 5 provided that in the event of absorption or merger as between two companies "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the unions involved." (R. 10). The same provision directed that "any controversy with respect to such matters shall be submitted to the joint grievance procedure." Manifestly, the agreement of the parties was to submit to the Joint Committee all grievances and questions of interpretation arising under their contract, "not merely those that a court may deem to be meritorious." *United Steelworkers* v. *American Mfg. Co., supra,* at 567.

2. The position of the state court that the Dealers and E & L employees were covered by separate and independent contracts, one without effect upon the other, is subject to the same criticism. For the scope of coverage of a collective bargaining agreement is a matter of interpretation for the "tribunal" chosen by the parties to the same extent as are the substantive provisions thereof. *United Steelworkers* v. *American Mfg. Co., supra.* For that reason the question before the Court below was not whether the various parties comprised "one big happy family" (R. 31), but whether it may be fairly argued that they had agreed to be bound by one collective bargaining agreement.

Plainly they had so agreed. The basic contract was negotiated for the several local unions by the National Conference and on behalf of the several employers by the Automobile Transporters Labor Division (R. 8-14, 39, 51-52). Both Dealers and E & L are parties to that basic contract (R. 51-52), each having agreed to recognize the National Conference as the exclusive representative of all employees involved (R. 9; Art. 1, Sec. 1), and "to become part of the multi-employer unit set forth in the Agreement." (R. 13; Art. 38). All the parties are therefor a part of a multi-employer, multi-union, multi-state bargaining unit which receives recognition and sanction under the National Labor Relations Act. *NLRB* v. *Truck Drivers Local 449,* 353 U.S. 87, 94 (1952); *Motor Cargo Inc.,* 108 NLRB 716. The

federal policy holding that by the contractual establishment of a multi-party bargaining unit the parties "have demonstrated their desire to be bound by group rather than individual action". (*Balaban and Katz*, 87 NLRB 1071, 1073), negates both the assertion of the state court that the E & L employees were "strangers to the Dealers contract" and its underlying assumption that "separate agreements" were in effect (R. 31). Thus the conclusion of the court below had the effect of fragmentizing a bargaining unit favored by the Act and debilitating the undeniable discretion of the bargaining representatives to determine for themselves "the unit within which seniority is to be computed." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953).

III

Since the issue of seniority was properly before the Joint Conference Committee, the resulting determination—constituting a negotiated agreement between the contracting parties—was not subject to judicial review.

1. Article 4, Section 5 which formed the basis of the determination of the Joint Conference Committee (R. 10), states that in the event of the absorption of one business into another, "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved." The provision thus constituted a direction to the contracting parties to negotiate further certain terms and conditions of employment which were not expressly spelled out in the contract. Under Article 7 of the contract (R. 10), the chosen instrument of such negotiation was the Joint Conference Committee, composed of representatives of both labor and management. The pre-condition to such negotiation had occurred when Dealers absorbed E & L's secondary authority in the south (R. 39, 42-43, 53, 58). The product of such negotiation was the decision to dovetail the seniority boards of the two companies.

To say, as did the court below, that the agreement of the

parties was not within their power as bargaining representatives "is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system . . . is part." *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 527 (1949). "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192, 202 (1944). Decisions of this Court have established the principle that an agreement of the contracting parties looking to the future governance of terms and conditions of employment may not be upset and, in fact, may not be subjected to question by the courts. *Elgin, Joliet, and Eastern R.R. Co.* v. *Burley*, 325 U.S. 711 (1945).

2. None of the grounds relied on by the court below supports its right to review the agreement of the parties in the instant case.

While the court below apparently decided that the parties' power to agree upon dovetailing the seniority of the employees involved was subject to certain "rights of tenure" of the Dealers employees (R. 33), the issue of whether under certain circumstances seniority may "vest" need not be decided by this Court. For in this case, the contract itself makes it clear that whatever seniority "rights" may have accrued to individual employees were necessarily qualified in the event of the absorption of the business of one company by another. In that event, provides the agreement, "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved." (Art. 4, Sec. 5; R. 10).

Nor would the finding of the court that both "factions" of employees were represented by the same union (R. 32) detract from the power of the contracting parties to agree without judicial interference. One of the facts of life of collective bargaining is that a union must often resolve

opposing interests within a bargaining unit. In so doing, the union is merely performing the required statutory duty of participating with the employer in deciding which employees would sustain the greater disadvantage as a result of employer changes in operation over which the union has no control (*Cf. Pekar* v. *Local 181, Brewery Workers*, 311 F2d 628 (6th Cir. 1962). In these circumstances, so long as no hostile discrimination is practiced, a union may properly participate in making such a decision without judicial interference. *Ford Motor Co.*, v. *Huffman*, 345 U.S. 330, 337-338 (1953).

Nor could the decision of the Committee be criticized on the grounds that "the influence of the Union stood to be enhanced" thereby (R. 32). There is nothing in the record to show any enhancement of the Union's influence or power as a result of the decision. But even if there were a showing of enhanced union influence, it must be deemed as nothing more than a natural consequence of union representation that has been frequently recognized and approved by this Court. "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944). The only enhancement of union influence that may be prohibited is that which is accomplished by discrimination. *Local 357, IBT* v. *NLRB*, 365 U.S. 669, 675-676 (1961).

IV

1. Even if the decision of the Joint Conference Committee were viewed as an "arbitration award," the Court below, in holding that said decision was on its merits "erroneous" (R. 31-32), exceeded the permissible bounds of its scope of review under Section 301. As observed by this Court, "it is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling

him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960). Regardless of whether the award pursuant to the grievance procedure is rendered by an arbitrator or a bipartisan committee appointed by the contracting parties, "it is of course not open to the courts to reweigh the merits of the grievance." *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918, 920 (1963).

2. Even if the decision of the Committee were subjected to a "rule of reason," a long history of practice in labor relations adequately supports its reasonableness. The principle of employee-protection in cases of mergers, absorptions and similar intercompany agreements has become solidified in various congressional enactments. See, Interstate Commerce Act, 49 U.S.C. Secs. 5 (2)(c) and (f), and Sec. 410 (g). The federal courts have consistently upheld decisions of the ICC, the CAB and bipartisan adjustment boards under the Railway Labor Act to dovetail the seniority of employees affected by mergers and other contractual adjustments of their employment status. *U.S.* v. *Lowden*, 308 U.S. 225 (1939); *Railroad Labor Executives Ass'n* v. *U.S.*, 339 U.S. 142 (1950); *Kent* v. *CAB*, 204 F2d 263 (2d Cir. 1953); *Starke* v. *N. Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950). In both *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), this Court upheld similar contractual adjustments of seniority rights over contentions that such actions were arbitrary and in excess of the bargaining representative's authority.

Accordingly, even if a broader scope of review were permitted than that which has become well established through decisions of this Court, the dovetailing of seniority, which has become a permanent fixture in the national labor scene, may not be held to be unreasonable.

V

In the exercise of both its negotiating and administrative functions as the representative of all employees in the

appropriate unit, the union is limited in power and authority by the duty of fair representation, which requires it—pursuant to Section 9 of the Labor Management Relations Act—to act fairly and honestly in the interests of the employees without hostile, invidious, or irrelevant discrimination. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Although the opinion of the court below intimates that a breach of such duty had occurred in this case (R. 28, 32-33), the complaint did not so allege. (R. 1-8). The most that can be said of the allegations of the complaint is that they obviously constitute statements of conclusion which are not supported by any particular identification of the hostile or irrelevant motive so necessary to a finding that the Union had breached its statutory duty. *Durandetti* v. *Chrysler Corp.*, 195 F. Supp. 653 (E.D. Mich. 1961); *Bailer* v. *Local 470, Teamsters*, 400 Pa. 188, 161 A2d 343 (1960). Additionally, the complaint is defective in that it does not allege that internal union remedies had been exhausted in the case. *Durandetti* v. *Chrysler Corp., supra; Fagan* v. *Pa. R.R.*, 173 F. Supp. 465 (M.D. Pa. 1959). Furthermore, Respondents waived their right to allege "inadequate representation" by failing to address their complaint to the Joint Conference Committee whose procedures they now bring into question. *Livingston* v. *John Wiley & Sons*, 313 F2d 52 (2d Cir. 1963). Finally, the issue of hostile discrimination was not raised in the courts below.

Even if it be assumed that the complaint was sufficient to raise the issue of hostile discrimination and that said issue is otherwise properly before the Court, bad faith motivation may not be found on the facts of this case. The protection of employees about to lose their jobs in an age of chronic and severe unemployment and job displacement affords ample reason for the action taken by the bargaining representative in this and similar cases. Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532, 1563 (1962); "Wall Street Journal," Vol. CLXII, No. 19, July 26, 1963, pgs. 1, 8. There is no suggestion in this record that the motives

behind the Union's action were not consistent with the readily evident reasons available therefor. As in *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), the Union here evidenced "honest desires for the protection of the interests of all members of the union." Where similar action had been taken in cases coming before this Court, the Court has recognized the validity of its purpose as evidencing "a due regard of union interests which embrace the system of seniority rights." *Campbell, supra*, 337 U.S. 521 at 527; *Ford Motor Co.* v. *Huffman, supra.*

The issue of whether Dealers employees, as a separate entity, enjoyed "representation" before the Detroit Committee is a spurious one. It evolves from the unwarranted assumption that these employees or a separate representative of their choice had the right to appear before the Committee and participate in its decision-making process. The assumption is not supported by law, regardless of whether the Committe's decision is viewed as a grievance award or a negotiated agreement. Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 748 (1950); NLRB General Counsel Adm. Dec., Case No. SR-2364, CCH NLRB ¶ 11, 960 (1962).

Finally, the allegations of the complaint that the Dealers employees were not represented by Paul Priddy at the Detroit hearing; even if taken as true, do not constitute such facts as would be prejudicial to the plaintiffs. There was no reason, on the facts presented, to reject the finding of the trial court in the instant case that "there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented." (R. 18-19).

VI

Since as heretofore demonstrated "hostile discrimination" is not in issue before the Court, it is submitted that the Respondents have no legal standing to question the decision rendered under the contract by the Joint Conference Com-

mittee. "The needs of the industrial community would be served best by leaving management and union free to determine by the terms of their collective bargaining agreement what shall be the respective rights of the union and the individual in its administration." Cox, "Rights Under A Labor Agreement," 69 Harv. L. Rev. 601, 618-619 (1956); *Black-Clawson Co., Inc.* v. *Machinists Lodge 355*, 313 F2d 179 (2d Cir. 1962).

The collective bargaining agreement in this case very clearly reserves the decision-making process to the contracting parties, while binding those parties as well as the employees to any resolution emanating from the grievance procedure. (R. 9-12). In the face of such contractual provisions reserving the implementation of the contract to the Union and the Employer alone, suits by individuals attacking the product of the grievance machinery should be excluded from the courts. As pointed out by the Second Circuit Court of Appeals in the *Black-Clawson* case, *supra*, the success of collective bargaining cannot stand impervious to an untrammeled right of individuals to sue: On the other hand, the adoption of the foregoing argument would not leave individual employees bereft of protection for their individual rights. See, *e.g.*, *Ford Motor Co.* v *Huffman*, *supra*; Labor Management Relations Act (29 U.S.C. 141, *et. seq.*), and particularly §9 thereof (*supra*, p. 2); and Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401, *et. seq.*).

ARGUMENT

I

INTRODUCTION

The instant case arises under Section 301 of the Labor Management Relations Act (*supra*, p. 2).

The "only issue" in the case, as presented by plaintiffs below, "is whether or not [the Committee's] decision is in violation of this contract" (R. 55), and its designation by the court below was "simply an action to construe and en-

force a contract.'" (R. 33). See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

The decision of the Joint Conference Committee does not escape the cognizance of Section 301 simply because "the word 'arbitration' does not appear in the collective bargaining agreement"—"if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under §301." *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918, 920 (1963).[8] It follows that the state courts had jurisdiction, but were bound to apply federal law. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 9 L. Ed. 2d 246 (1962). Argument with respect to that aspect of the decision below which involves conflict between state and federal law and raises an issue under the Supremacy Clause of the United States Constitution is presented to the Court in Petitioners' Brief in companion case No. 17 and is adopted by this Petitioner.

Embraced within the Section 301 issue are principles relative to the effect of multi-employer and union bargaining units,[9] the dovetailing of seniority,[10] the union's duty of fair representation,[11] and the relationship of union and individual rights under collective bargaining agreements,[12] all of which, "taken together, shape the national labor policy." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). Undeniably, it is the whole gamut of policies of our national labor laws which constitutes the source of substantive law to be fashioned by the courts under Section

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[8] See also, *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962); *Parks* v. *IBEW*, 314 F2d 886, 910 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963) ("Submission to the Council is not classical arbitration, but resembles it sufficiently to fall within the ambit of [Section 301] policy").

[9] *E.g.*, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957).

[10] *E.g.*, *U.S.* v. *Lowden*, 308 U.S. 225 (1939).

[11] *E.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).

[12] *E.g.*, *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944).

301. *TWU* v. *Lincoln Mills, supra.*

Also pervasive to the controversy is the following conceptual dichotomy: If the Joint Conference Committee were viewed simply as the final step in the grievance machinery and the submitted dispute as a "grievance," the case is one designed to avoid an "award" in the classical setting of "arbitration;" [13] if, on the other hand, the bipartisan Committee constitutes an extension of the negotiating arms of the parties to the contract, and the submission a call to action by the bargaining representatives to implement an open-ended seniority provision, the case may be viewed as seeking to avoid the consequences of an agreement newly negotiated by the contracting parties.[14]

Upon either view, the principles of Section 301 and other national policies above-described must be brought to bear and the decision of the Committee must be upheld.

II

THE COURT BELOW WAS IN ERROR IN HOLDING THAT THE DISPUTE WAS NOT PROPERLY BEFORE THE COMMITTEE, THE COURT HAVING SUBSTITUTED ITS OWN INTERPRETATION OF ARTICLE 4, SECTION 5 AND ITS OWN VIEW AS TO THE SCOPE AND COVERAGE OF THE MULTI-EMPLOYER, MULTI-LOCAL UNION COLLECTIVE BARGAINING AGREEMENT FOR THE INTERPRETATION OF THE COMMITTEE.

1. The abiding principle governing the settlement of contractual disputes was stated by Congress with its enactment of the Labor Management Relations Act (Section 203(d)):

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for

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[13] *Cf. United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960) with *Drivers Union* v. *Riss & Co., supra.*

[14] *Ford Motor Co.* v *Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949).

> settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

"That policy," in the words of this Court, "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Accordingly, when the parties have agreed upon a method for the settlement of disputes and agreed further to utilize the prescribed method for the resolution of all such disputes, the courts have been admonished not to interfere:

> The function of the court . . . . is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . The courts, therefore, have no business weighing the merits of the grievance. . . .[15]

The rule which restricts participation by the courts and permits discretion to the contracting parties has ample foundation in reason:

> Within the interstices [of the contract], familiarity with the parties' way of life and general industrial practice is essential to sound interpretation. A written instrument must be read with the eyes of those to whom it is addressed. The inclusion of an arbitration clause shows a desire to commit such questions to a tribunal with the specialized knowledge and experience necessary to perceive the substance which lies beyond dictionary definitions; this may be implicit in the collocation of ideas even though there is no single phrase or sentence in which it finds expression. And surely no collective agreement contemplates elaborate proof of its industrial context first in the suit to compel arbitration and later in arbitration.[16]

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[15] *United Steelworkers* v. *American Mfg. Co., supra,* at 568; See also *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918, 920 (1963).

[16] Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1515 (1959).

The desire of the parties was, in this case, expressed with unusual force and clarity. The parties agreed to submit "any controversy" over the employees' standing on seniority lists "to the joint grievance procedure." (R. 9; Art. 4, §1). They further agreed to desist from using "self-help" methods "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (R. 11; Art. 7, §1). "All matters pertaining to the interpretation of any provision . . . must be submitted to the . . . Joint Conference Committee" (R. 12; Art. 7 §2(d)), whose decision "shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." (R. 12; Art. 7, §2(e)). The stated intention of the parties was "to resolve all questions of interpretation by mutual agreement." (R. 13; Art. 7, §2(f)). The substantive provision of the contract invoked by the grievants, Article 4, Section 5 (R. 10), provided that in the event of absorption or merger as between two companies "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved." It further directed that "any controversy with respect to such matter shall be submitted to the joint grievance procedure." Manifestly, the agreement of the parties was to submit to the Joint Committee all grievances and questions of interpretation arising under their contract, "not merely those that a court may deem to be meritorious." *United Steelworkers* v. *American Mfg. Co., supra*, at 567.

In the eyes of the state court, the dispute was not properly before the Joint Conference Committee because "we cannot find any such meaning" in Article 4, Section 5, as attributed to it by the Committee (R. 31). The court read the provision as conditioning the parties' consideration of the seniority problem upon the assumed choice of the absorbing employer to employ or reject the employees of the absorbed company. (R. 31). However, the phrase "the seniority of the employees absorbed . . . thereby" arguably implies that the absorbing employer must absorb the em-

ployees as well. Even if that were not so, the provision plainly applies by virtue of the phrase "affected thereby," and only disregard of those words can justify the interpretation of the court below. At the very least, it is plain that the Joint Conference Committee had before it "a claim which on its face is governed by the contract." *United Steelworkers* v. *American Mfg. Co., supra,* at 568. It was not in the province of the court to go beyond this point and determine "arbitrability" on the basis of its own, independent interpretation of the substantive contractual provision invoked by the parties.

2. The position of the state court that the Dealers and E & L employees were covered by separate and independent contracts, one without effect upon the other, is subject to the same criticism. The scope of coverage of a collective bargaining agreement is a matter of interpretation for the "tribunal" chosen by the parties, to the same extent as are the substantive provisions thereof, with but one question reserved to the court—whether the asserted claim is "on its face" governed by the contract.[17] The number of parties asserting rights under a contract has never been thought to be of moment if agreement had been reached to settle inter-party disputes by a particular method agreeable to all. *Retail Clerks* v. *Lion Dry Goods Inc., supra; Holman* v. *Industrial Stamping Co.,* 344 Mich. 235 (1955); *Parks* v. *IBEW,* 314 F2d 886 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963). Whether that method was intended to embrace a certain party or a particular group of employees in a given dispute is a question within the special competence of the contracting parties. For what to the Union and the employer may be a "familiar interplay of reliance upon the literal terms of the contested standard, its place in the con-

[17] *United Steelworkers* v. *American Mfg. Co., supra,* at 567; *Livingston* v. *Wiley & Sons,* 313 F2d 52, 57 (2d Cir. 1963): "We cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract."

tractual scheme, the objective it is designed to serve, the consequences of differing results, and the plant and industry usage,"[18] is to many courts an enigmatic wonderland. For that reason the question before the court below was not whether the various parties involved comprised "one big happy family" (R. 31), but whether it may be fairly argued that they had agreed to live together under the same contractual "tent."

Plainly they had so agreed. The basic contract was negotiated on behalf of the several local unions by the National Conference, and on behalf of the several employers by the Automobile Transporters Labor Division (R. 8-14, 39, 51-52). Both Dealers and E & L are parties to the contract, having signed separate copies thereof (R. 51-52). Each agreed to recognize the National Conference, on behalf of its member locals, as the exclusive representative of all employees involved (R. 9; Art. 1, §1). Each expressly agreed "to become a part of the multi-employer unit set forth in the Agreement." (R. 13; Art. 38). Of course, the same substantive provisions and grievance procedure are applicable to all employees. This results in a multi-employer, multi-local union, multi-state bargaining unit which receives recognition and sanction under the National Labor Relations Act. *Motor Cargo, Inc.*, 108 NLRB 716. It has been said that the Act "exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of *appropriate units of employees.*" *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953) (emphasis supplied). The type of "appropriate" unit in effect here "long antedated the Wagner Act." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94 (1957). As of 1957, four million employees "were governed by collective bargaining agreements signed by un-

[18] Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731 (1950).

ions with thousands of employer associations."[19] Bills introduced in Congress to outlaw the multi-employer unit have been defeated by "a storm of protest that their adoption would tend to weaken and not strengthen the the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining." *NLRB* v. *Truck Drivers Local 449, supra,* at 95.

"The fact that the results of joint negotiation have been incorporated in separate uniform contracts" which have been separately signed by the individual parties is entirely consistent with the existence and effectiveness of the multi-employer unit. *Balaban & Katz,* 87 NLRB 1071. Once the unit is formed, the right of withdrawal therefrom is carefully circumscribed lest damage be done to the national policy of "fostering and maintaining stability in bargaining relationships." *Retail Associates, Inc.,* 120 NLRB 388 (1958); *Donaldson Sales, Inc.,* 141 NLRB No. 116 (1963). Any economic pressure exerted by private parties which "threatens the destruction of the employers' interest in bargaining on a group basis," may legitimately be met with similar, countervailing action (*NLRB* v. *Truck Drivers Local 449, supra*), and may in fact run afoul of the Act. *Bricklayers Union (Builders Institute),* 142 NLRB No. 14 (1963). The purpose of bargaining on that basis is not only to permit equalization of power between labor and management, but to assure that all employees within a certain area or industry work under the same rates, working conditions, rights and obligations so as to minimize threats to peaceful relations in the area or industry involved and to remove labor costs from competition. *Cf.*

[19] *NLRB* v. *Truck Drivers Local 449, supra,* at 95. The following notation appears in Summers, "Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L. J. 421, note 1 (1963): "Nearly 40% of all workers covered by collective agreements are in multi-employer systems . . . Multiple-employer bargaining is particularly dominant in the Clothing, Construction, Coal Mining, Hotel and Transportation industries. . . ."

American Steel Foundaries v. *Tri-City Central States Council*, 257 U.S. 184 (1921); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *U.S.* v. *Hutcheson*, 312 U.S. 219 (1941). The federal policy holding that by the contractual establishment of a multi-party bargaining unit the parties "have demonstrated their desire to be bound by group rather than individual action"[20] negates both the assertion of the state court that the E & L employees were "strangers to the Dealers contract" and its underlying assumption that "separate agreements" were in effect. (R. 31).

If this arrangement were not to the liking of the state court, the national labor policy cautioned against interference, for it was not for the court to "cure whatever deficiencies (it) may think exist in the pattern the parties have fashioned," or "to remake the contract by introducing even salutary provisions not legislatively prescribed or necessarily implied." *Parks* v. *IBEW*, 314 F2d 886, 907, 917 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963). Particularly is this true where, as here, the conclusion of the court had the effect of fragmentizing a bargaining unit favored by the Act and debilitating the undeniable discretion of the bargaining representatives to determine for themselves "the unit within which seniority is to be computed." *Ford Motor Co.* v. *Huffman*, *supra*, at 338-339.

III

SINCE THE DECISION OF THE JOINT CONFERENCE COMMITTEE CONSTITUTED A NEGOTIATED AGREEMENT BETWEEN THE CONTRACTING PARTIES, IT WAS NOT SUBJECT TO JUDICIAL REVIEW ON ITS MERITS.

If, as urged in Argument II, *supra*, the issue of seniority was properly before the Joint Conference Committee, the resulting determination—constituting a negotiated agreement between the contracting parties—was not subject to judicial review.

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[20] *Balaban & Katz*, *supra*, at 1073

A. Agreement of Contracting Parties Not Reviewable

Article 4, Section 5, which formed the basis of the determination of the Joint Conference Committee (R. 10), states that "in the event" of the absorption of one business into another, "the seniority of the employees absorbed or affected thereby *shall be determined by mutual agreement* between the Employer and the Unions involved." (emphasis supplied). Here is a direction to further negotiation of terms and conditions of employment not expressly spelled out in the contract. The chosen instrument for such negotiation was the Joint Conference Committee whose decision is now in dispute—"Any controversy with respect to such matter shall be submitted to the joint grievance procedure (Article 7)." (R. 10). The precondition to such negotiation had occured in this case; Dealers had absorbed E & L's "secondary authority" in the South (R. 39, 42-43, 53). That an absorption had taken place was frankly admitted by Dealers (R. 44, 58). The question of the seniority status of the employees "affected thereby" was resolved by negotiation between the parties, as members of the Joint Conference Committee, pursuant to the direction of Article 4, Section 5 and Article 7. The product of such negotiation was the agreement to dovetail the seniority boards of the two companies (R. 3-4, 59-60).

That the process invoked was one of negotiation is not open to serious doubt. The contract provision relied on did "little more than leave problems to future consideration with an expression of hope and good faith."[21] The nature of such provisions was aptly explained by Professor Cox:

> Many provisions do little but establish the framework for further bargaining. Others have a generality which obviously looks to joint labor-management particularization. Deliberate ambiguities, inadvertent omissions, and unforeseen contingencies require continual rule making which, passing in the guise of interpretation, parallels

[21] Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1005 (1955).

the law making of courts and administrative agencies.[22]

In the process of "legislation" of *its future* conditions, as distinguished from the "administration" of existing conditions,

> there are no agreed criteria against which each side may evaluate the claims of the other or justify its own. To the support of their positions both bring a combination of pressure and persuasion, and out of the resulting interchange an area of accord is reached for the future governance of the employment relationship.[23]

The fact that the legislation effected in this case used as its vehicle the regular grievance procedure does not detract from its essential character. For it is generally recognized that "both the negotiation of a new employment standard and the administration of an existing one may be effected through the grievance machinery that is almost invariably established by agreement."[24] Nor is the argument disturbed by reason of the fact that the negotiative process took place in the midst of a contract term. This Court has, on numerous occasions and in varying situations, expressed its belief that collective bargaining "is a continuous process . . . [N]either the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 525 (1949).

Thus the parties to the contract in this case have agreed upon a solution which is "the product of the exercise of federally sanctioned collective bargaining rights." *Teamsters Union* v. *Oliver*, 358 U.S. 283, 289, 297 (1959). The agreement negotiated by the Union "binds the individual worker even though both he and his employer might prefer a different ararngement."[25] To say that the Union's action was dehors its power "is to ignore a vast body of long-establ-

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[22] Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601, 606 (1956).

[23] Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 732 (1950).

[24] *Ibid.*, at 733.

[25] Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L. J. 850 (1957); see also *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944).

ished controlling practices in the process of collective bargaining of which the seniority system . . . is part." *Aeronautical Industrial Dist. Lodge 727* v. *Campbell, supra,* at 527. A recent example of these "controlling practices" was demonstrated in *Hildreth* v. *Union News Co.*, 315 F2d 548 (6th Cir. 1963). There the court held that "the Union was the exclusive representative of all the employees in the unit involved for the purposes of collective bargaining, and that such statutory power, in combination with the terms of the bargaining contract, authorized the Union and the [company] to mutually conclude, as a part of the bargaining process," that a certain employee should be discharged for good cause. (at 550). The issue there, as stated by that court, was the same as the issue here—"whether, under the circumstances here involved, the Union had the authority, acting in the collective interest of those whom it represented, to agree with the defendant [company] on necessary corrective measures to be taken without such action being treated as a breach of the collective bargaining agreement." (at 551). The answer of the court was that "such authority existed and was properly exercised." (at 551). For a further recent application of the foregoing principle, see *Giordano* v. *Mack Trucks, Inc.*, 203 F. Supp. 905 (D. N. J. 1962).

"Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). In *Elgin, Joliet & Eastern R.R.* v. *Burley*, 325 U.S. 711, 739 (1945), this Court made clear the insulation from attack of union privilege to effectuate agreements looking to the future governance of terms and conditions of employment:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. . . . It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement.

It is within those established boundaries that the Union

and the Employer rendered their decision in the instant case. "Unless such bilateral decisions, made in good faith and after unhurried consideration between a Union and an employer, be sustained in court, the bargaining process is a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory." *Union News Co.* v. *Hildreth*, 295 F2d 658, 664 (6th Cir. 1961).

B. Grounds Relied On By Court Below.

None of the grounds relied on by the court below supports its right to review the agreement of the parties in the instant case.

1. The "Rights of Tenure" Theory.

While the court below apparently decided that the parties' power to agree upon dovetailing the seniority of the employees involved was subject to certain "rights of tenure" or "vested" rights of the Dealers employees respecting seniority (R. 33),[26] that issue need not be decided by this Court. For the contract in this case, on its face, qualified whatever seniority "rights" had accrued to individual employees by providing that in the event of absorption of the business of one company by another "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved." (Art. 4, §5, R. 10). As previously noted, it was pursuant to that provision that the parties agreed to dovetail seniority.

2. Same Representative for Two Factions.

Nor does the fact that both "factions" of employees were represented by the same union (R. 32), detract from the power of the contracting parties to agree without judicial interference. One of the facts of life of collective bargain-

[26] But see, *contra*, *Aeronautical Industrial Dist. Lodge, 727* v. *Campbell, supra; Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959); *Falsetti* v. *Local 2026, United Mineworkers*, 46 LRRM 2389, 161 A2d 882 (Pa. S. Ct. 1960); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 37 LRRM 2274 (1955); Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532 (1962).

ing is that a union must often resolve opposing interests within a bargaining unit. Especially is this so where, as here, a merger is effected which seriously jeopardizes the seniority of a substantial number of employees represented by the union. While in such cases the union is often blamed by the adversely affected group for having caused its injury, the union is merely performing the required statutory duty of participating with the employer in deciding which employees would sustain the greater disadvantage as a result of employer changes in operation over which the union has no control.[27] And, in these circumstances, so long as no hostile discrimination is shown, a union may properly participate in making such a decision without judicial interference. This was precisely the view expressed by this Court in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.
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> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. (345 U.S. at 337-338).[28]

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[27] It is not at all unlikely that if, in the instant case, the Joint Committee's decision had favored the Dealer's employees, the E & L employees would have instituted a similar suit. It is interesting to note that the exact reverse of this case occurred in *Pekar* v. *Local 181, Brewery Workers*, 311 F2d 628 (6th Cir. 1962). There the employees of a recently closed plant of a company asked the union to process a grievance whereby their seniority would be dovetailed with that of the employees in a still-open plant. The union refused, and the employees sued. The court, however, declined the invitation to question the exercise of the union's discretion.

[28] For similar expressions of view, see *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959); *O'Donnell* v. *Pabst Brewing Co.*, 107 NW

The commentators in the field have recognized that a requirement that all collective decisions be equally balanced in their effect upon the various groups of employees involved would not only be an impossibility but a serious detriment to the essential freedom and flexibility of the collective bargaining process.

> In negotiating seniority provisions . . . the union is permitted a considerable latitude of discretion . . . it may propose or agree to changes in existing seniority rights that are adverse and detrimental to the interests of some of the employees affected. The same generally is true in respect to administration of a seniority system . . .[29]

Professor Cox has pointed out that group interests "may conflict with the claims of individuals because several classes of individuals have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to the wishes of a numerical majority of the members."[30] The function of the union in such circumstances was explained by Professor Cox in the following terms:

> When the interests of several groups conflict or future needs run contrary to present desires or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice and emotion. Limits must be placed on the authority of the group but within the zone of fairness and rationality this method of self-gov-

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2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961); *Parks* v. *IBEW*, 314 F2d 886 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963); *Pekar* v. *Local 181, Brewery Workers*, 311 F2d 628 (6th Cir. 1962); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235 (1955); *Cf. Grand Lodge* v. *Girard Lodge*, 384 Pa. 248, 120 A 2d 523, 528 (1956): "[W]hen there are only five apples for six people, it is impossible for each person to receive a whole apple."

[29] Aaron, *supra*, note 26, at 1536.

[30] Cox, *supra*, note 22, at 604.

ernment probably works better than the edicts of any outside arbiter."[31]

3. Enhancement of Union Influence.

The court below was critical of the Joint Committee decision because "the influence of the union stood to be enhanced" thereby (R. 32). There is nothing in the record to support that conclusion. The enhanced power or influence of the Union as a result of a decision to dovetail seniority is, therefore, a matter of speculation; but in varying degrees it may be the inevitable product of the collective bargaining process. When a favorable agreement is signed, whereby the employer relinquishes his formerly absolute power and permits the union to share in the decision making process, the union's power is perforce enhanced in direct proportion to the degree and kinds of power yielded by the employer. The same holds true as to each definable area of conditions of employment embodied in the agreement. It is particularly true in the case of seniority, for that concept, as such, is first born in the collective agreement. The power which is in that manner committed to the union by the effectuation of the agreement thereafter grows or diminishes, in turn, depending on the degree of effectiveness with which the contract is administered and new agreements are negotiated by the bargaining agent. As stated by Professor Aaron:

> [E]very seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interests of each worker against those of all the others."[32]

Not only is there no way to avoid this phenomenon, given the present system of collective bargaining, but the avoidance thereof is not a desirable end to pursue if the system is to remain workable. For "the very purpose of providing

[31] Cox, *supra*, note 25, at 856.

[32] Aaron, *supra*, note 26, at 1534-1535.

by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944). As stated by this Court in *Local 357, I.B.T.* v. *NLRB*, 365 U.S. 667, 675-676 (1961):

> When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But, as we said in Radio Officers' Union, C.T.U. v. NLRB (US) supra, the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.'

Thus, the decision of the court below, on any of the above grounds, could only be sustained by a drastic alteration of federal law and practice that has maintained the vitality of the collective bargaining process for some 28 years.

IV

THE COURT BELOW ERRED IN SETTING ASIDE THE DECISION OF THE COMMITTEE ON THE GROUND THAT, IN ITS VIEW OF THE MERITS OF THE DISPUTE, THE DECISION WAS ERRONEOUS.

1. Even if the decision of the Joint Conference Committee could not be viewed as an agreement of the contracting parties made pursuant to negotiation, but is seen solely as the product of the parties' function of administering the contract through the grievance procedure, the court below, in holding that said decision was on its merits "erroneous" (R. 31-32), exceeded the permissible bounds of its scope of review under Section 301. Unless judicial review of a deci-

sion already rendered were subjected to the same stringent limitations as applied to questions of arbitrability, the "favored method of resolving industrial disputes would atrophy for non-use." *Farris* v. *Alaska Airlines, Inc.*, 116 F. Supp. 907, 908 (W.D. Wash. 1953). This Court has therefore observed that "it is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960); See, also, *Local 453, IUE* v. *Otis Elevator Co.*, 314 F2d 25 (2d Cir. 1963). Here it was the Committee's construction "which was bargained for," received, and accepted by the parties until the wrongful intervention of the court below deprived them of their bargain.

In *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918 (1963), this Court had before it a decision of the Sixth Circuit, setting aside an award rendered by a joint committee similar in composition to the Committee in this case pursuant to an agreement then in effect between petitioner here and an employer, on the grounds *inter alia*, that the award was not an "arbitration award" and was, in any event, erroneous on its merits. That decision was reversed, this Court concluding as follows:

> [I]f the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, *it is of course not open to the courts to reweigh the merits of the grievance.* (at p. 920) (emphasis supplied).

The holding in *Riss* must, therefore, be deemed dispositive of the instant issue.

2. Even if the decision of the Joint Conference Committee were subject to the "rule of reason," a long history of practice in labor relations constitutes eloquent testimony to the fact that the solution arrived at by the Committee was neither unreasonable, novel nor revolutionary in any

sense. The contract provision relied on by the grievants and by the Committee is a familiar instrument of collective bargaining:

> Seniority rights also can be designed to protect employees against the loss of their employment preferences under specific anticipated contingencies. Provisions covering such subjects as interplant transfers, mergers, or acquisition of new facilities are not uncommon.[33]

The principle of employee-protection in the case of mergers, absorptions and like inter-company arrangements has become too solidified through the course of congressional enactments and court decisions to permit question. The Interstate Commerce Act, for example, provides express protection to employees of motor carriers and railroads (49 U.S.C. §§5(2)(c) and (f)). With respect to motor carriers, §5(2)(c) provides that in "passing upon any proposed transaction . . . the Commission shall give weight to . . . the interest of the carrier employees affected." As to carriers by railroad, §5(2)(f) states that as "a condition of its approval . . . of any transaction . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," and that its order shall include "conditions providing that during the period of four years from the effective date of such order, such transaction will not result in employees . . . affected by such order being in a worse position with respect to their employment. . . ." The concern of Congress was illustrated by the addition of §410 (g) to the aforementioned Act in 1942 to assure protection to employees of freight forwarders:

> Provided, however, that if the proposed transfer would affect the interests of employees of a freight forwarder, the Commission shall require as a prerequisite thereto, a fair and equitable arrangement to protect the interests of the employees affected.

The federal courts have consistently sanctioned decisions

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[33] Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532, 1542 (1962).

of the ICC,[34] the CAB [35] and bipartisan adjustment boards under the Railway Labor Act [36] to dovetail the seniority of employees affected by mergers and other contractual adjustments of their employment status. In both *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), this Court upheld similar contractual adjustments of seniority rights over contentions that such contracts were "arbitrary" and that the bargaining representative exceeded its authority by so contracting. See also, *Hardcastle* v. *Western Greyhound Lines*, 303 F2d 182 (9th Cir. 1962); *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959); *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385 (1958); *O'Donnell* v. *Pabst Brewing Co.*, 107 NW 2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961). More recently, the General Counsel of the National Labor Relations Board refused to issue complaint upon the allegation that the dovetailing of seniority was discriminatory. Adm. Dec. of Gen. Counsel, Case No. SR-1973, CCH NLRB ¶11, 305 (May 17, 1962). In that case, the contract between a union and two common carriers specified that in the event

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[34] *U.S.* v. *Lowden*, 308 U.S. 225 (1939); *Railroad Labor Executive Ass'n.* v. *U.S.*, 339 U.S. 142 (1950). The original *Lowden* case before the I.C.C. was resolved only after "counsel for the applicants . . . stated that they are willing to 'dovetail' the seniority lists [of the two carriers involved]." *C.R.I. and G. Trustees Lease*, 230 I.C.C. 181, 187. In *Hall's Motor Transit Co.—Control and Merger—Buck Express, Inc.*, No. MC-F-7593, the examiner stated that "dovetailing employees is an equitable solution to the seniority problem concommittant to the unification." (unpublished; decision effective May 23, 1961).

[35] *Kent* v. *CAB*, 204 F2d 263 (2d Cir. 1953). In the recent "United-Capitol Merger Case," the CAB approved the merger subject to the following protection: "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected." (Docket 11699, App. A, p. 1, April 3, 1961).

[36] *Starke* v. *N. Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950); *Fagan* v. *Pa. R.R.*, 173 F. Supp. 465 (M.D. Pa. 1959).

of a purchase by one of the other the seniority lists of the two groups of employees would be dovetailed. Upon the occurrence of the specified event and the implementation of the provision, the effort to set it aside at the hands of the Board was unsuccessful.

The dovetailing of seniority, and similar devices of employee-protection, have indeed become a permanent fixture in the national labor scene.

V

THE DECISION BELOW WAS LIKEWISE INCONSISTENT WITH FEDERAL LAW INSOFAR AS IT IMPLIED A BREACH OF THE UNION'S DUTY OF FAIR REPRESENTATION.

In the exercise of both its negotiating and administrative functions as the representative of all employees in the appropriate unit, the Union is limited in power and authority by the duty of fair representation, which requires it —pursuant to § 9 of the Labor Management Relations Act —to act fairly and honestly in the interests of the employees without hostile, invidious or irrelevant discrimination. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949); *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive F & E*, 323 U.S. 41 (1957); *Conley* v. *Gibson*, 355 U.S. 41 (1957). Although the opinion of the court below intimates that a breach of such duty had occurred in this case (R. 28, 32-33), the complaint did not so allege (R. 1-8). The complaint states that the Dealers employees had "relied on . . . the integrity and fairness of Local 89 and the International . . . to take care of their interest in said grievance" (R. 3), that Paul Priddy, president of the Local, deceived the plaintiffs and "left them without representation before the . . . Committee" (R. 3); that the Committee's decision was "contrived" by the Local and the power of the International was used against the Dealers employees (R. 4-5);

and that the Union "has deceived and failed completely to represent said employees." (R. 5). The foregoing are very obviously statements of conclusion which are not supported by a particular identification of the "hostile" or "irrelevant" motive so necessary to a finding that the Union had breached its statutory duty. *Bailer* v. *Local 470, IBT,* 400 Pa. 188, 161 A2d 343 (1960); *Hot Shoppes, Inc.* v. *McNamara,* 52 LRRM 2196 (N.Y.S. Ct. 1963); *O'Donnell* v. *Pabst Brewing Co.,* 107 NW 2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961). Allegations strikingly similar to those made in the instant case were before the court in *Durandetti* v. *Chrysler Corp.,* 195 F. Supp. 653 (E. D. Mich. 1961), and were found insufficient for the following reasons:

> The alleged misrepresentations by Local 227 officials and Chrysler to the plaintiffs regarding the retention of seniority rights by temporary transferees to Trenton, even if true, and the alleged refusal of Sumeracki to process the grievances do not indicate any "hostile discrimination."
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> The plaintiffs have, at best, stated a cause of action containing a mixture of unfair labor practices, violation of seniority rights, or breach of contract, none of which indicate "hostile discrimination" or differences based upon "irrelevant" and "invidious" factors, See *Berman* v. *National Maritime Union,* 166 F. Supp. 327, 332, 43 LRRM 2209 (S.D. N.Y. 1958).

The complaint in this case suffers the same fatal defect. Additionally, causes of action based on the theory of "hostile discrimination" are subject to the precondition that plaintiff's grievance against his union be first explored through available internal union remedies. *Hot Shoppes, Inc.* v. *McNamara,* 52 LRRM 2196 (N.Y. S.Ct. 1963); *Fagan* v. *Pa. R.R.,* 173 F. Supp. 465 (M.D. Pa. 1959); *Durandetti* v. *Chrysler Corp.,* 195 F. Supp. 653 (E. D. Mich. 1961). The complaint in this case does not allege that such remedies had been exhausted; nor was there a showing that an attempt had been made to explore that avenue of relief.

Furthermore, if Dealers employees felt inadequately represented before the Detroit Committee, their complaint

should have been addressed by the Dealers shop stewards to the Committee in Detroit. The majority of courts and commentators have taken the position that questions of procedure in cases of "arbitration" are within the jurisdictional realm of the arbitrator and not the courts. *RCA* v. *Ass'n of Professional Engineering Personnel*, 291 F2d 105, 48 LRRM 2270 (3d Cir. 1961); *IAM* v. *Hayes Corp.*, 296 F2d 238, 49 LRRM 2210 (5th Cir. 1961); *Livingston* v. *John Wiley & Sons*, 313 F2d 52, 52 LRRM 2223 (2d Cir. 1963), and authorities cited in notes 6, 7 and 8. As stated by the Second Circuit Court of Appeals in *Livingston*, *supra*, a contrary result "would open the door wide to all sorts of technical obstructionism." (313 F2d at 63). "There is nothing startling about this distribution of power"[1]—court actions challenging decisions of administrative agencies have traditionally proceeded upon the hypothesis that all available issues of law and procedure had been presented, at the first instance, to the agency and that thereby all recourse to administrative relief had been exhausted." The Record in this case, however, demonstrates that the Dealers shop stewards were given every opportunity to state their position, that they did in fact do so, and that they made no contention before the Committee as to their "inadequate representation." (R. 37-40, 51). Under these circumstances, the question of "due process" before the Committee must be held to have been waived by Respondents. *Local 149, Automobile Workers* v. *American Brake Shoe Co.*, 45 LRRM 2437, 2440 (W.D. Va. 1959), aff. 285 F2d 869; *Farris* v. *Alaska Airlines, Inc.*, 113 F. Supp. 907, 32 LRRM 2547, 2549 (W.D. Wash. 1953). Finally, the issue of hostile discrimination was not raised below. Plaintiffs stated, "our only issue is whether or not their [the Committee's] decision is in violation of this contract" (R. 55) and the court below designated the case as "simply an action to construe and enforce a contract." (R. 33).

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[1] Cox, "Reflections Upon Labor Aribitration," 72 Harv. L. Rev. 1482, 1509, at notes 76 and 77 (1959).

Even if it be assumed that the complaint were sufficient and the issue properly before the Court, bad faith motivation may not be found on the facts of this case. No element of arbitrariness or hostile discrimination may be said to inhere in the Committee's decision to dovetail seniority (*supra*, pp. 37-40). The decision was arrived at through the process of negotiation between the parties to the contract, pursuant to a contractual provision expressly calling for such negotiation at the hands of the Joint Conference Committee (Article 4, §5; R. 10). "Most authorities have distinguished rather sharply between the nature of the union's duty of fair representation in negotiating a collective agreement and the nature of that duty in handling grievances arising out of the agreement once it had been negotiated".[38] These authorities have evinced a widespread and frank recognition of the fact that "legislative issues offer less opportunity for invidiousness than grievance questions, because employment standards are customarily framed to blanket a class of employees evenly, whereas their application to particularized situations within a class enables picking and choosing."[39] Professor Summers has similarly emphasized that the final settlement resulting from the negotiation of an agreement constitutes "a single package of assorted benefits which are neither equal nor rational but which will meet the practical needs of the parties and provide peace. . . . For the law to impose substantial limits by inquiring closely into the fairness of the compromises would hinder the parties in arriving at peaceful settlements."[40]

This is not to suggest, however, that the reasons underlying the Union's conduct or position in the instant case would not withstand close and fair scrutiny. Quite to the

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[38] Aaron, "Some Aspects of the Union's Duty of Fair Representation," 22 Ohio St. L. J. 39, 43 (1961).

[39] Dunau, *supra*, note 23, at 760.

[40] Summers, "Individual Rights in Collective Agreements—A Preliminary Analysis," N.Y. U. 12th Annual Conference on Labor 63, 71-72 (1959).

contrary, the protection of employees about to lose their jobs in an age of chronic and severe unemployment and job displacement affords ample reason for ameliorative action by the bargaining representative. The concern of the laboring population over the employment trends of today was expressed by Professor Aaron (*supra*, note 33, at 1563) as follows:

> The impact of our 'raging technology' has become increasingly severe; already it has destroyed or substantially altered the structure of the workers' society built up over the years by collective bargaining and legislation. Wholesale replacement of men by machines in a number of industries has wiped out, or is threatening with imminent extinction, the jobs of thousands of workers who have relied upon the delusive security provided by their seniority. In other industries the nature of the product has changed so completely that the skill requirements are now entirely different, and men who have spent years working on highly skilled jobs no longer have the ability to perform the new tasks. In manufacturing generally, there has been a pronounced shift in manpower needs from "blue collar" workers to "technical and professional personnel."

The trucking industry in particular has felt very keenly the impact of our "raging technology." "There's evidence that the truckers are justified in their fears that they will lose business to the railroads if the present rate trends continue. In 1958, truck lines hauled roughly 80% of all new automobiles from factories to dealers' showrooms. Development of new rail rack cars to haul autos, coupled with rate cuts, has reduced the truckers' share to about 50%. Membership in the National Automobile Transporters Association, a truckers group, has skidded to 60 from 100 since 1958." [41] The fears of the truckers become quite naturally the fears of their employees and where, as in this case, the fears are realized by the threatened extinction of hundreds of jobs, the collective bargaining agent must act.

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[41] "The Wall Street Journal," Vol. CLXII, No. 19, July 26, 1963, pp. 1, 8.

There is no suggestion in the record that the motives behind the Union's action were not consonant with the readily evident reasons available therefor. No different conclusion may be reached than that advanced by the court in the *O'Donnell* case,[42] wherein the circumstances closely resembled those found in the instant case:

> [T]he change of seniority complained of arose as a result of orderly negotiations between [the parties] in an effort to secure the greatest good for the greatest number of the employees [of the merged companies] and an effort to afford continuing employment to men and women who would otherwise have been thrown out of work.

As in the *Campbell* case,[43] the Union here evidenced "honest desires for the protection of the interests of all members of the union." The translation of these desires into action in the arena of seniority had been anticipated, with favor, in *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192, 203 (1944):

> Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit.

Where such action had in fact been taken in concrete cases, as in both *Campbell, supra,* and *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), this Court recognized the validity of its purpose as evincing "a due regard of union interests which embrace the system of seniority rights." (337 U.S. 521, at 527). The attempt of the plaintiffs to show foreknowledge of the facts by the Committee and that the Local had "contrived" the decision must prove unavailing, for advance knowledge of the facts is to be expected and undue influence was not proved at the trial. *Cf. Farris* v. *Alaska*

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[42] *O'Donnell* v. *Pabst Brewing Co.*, 45 LRRM 2059, 2060 (Wis. Cir. Ct. 1959), aff. 107 NW2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961).

[43] *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949).

Airlines, Inc., 113 F. Supp. 907 (W.D. Wash. 1953). Nor does "mere disagreement" with the solution arrived at "constitute per se bad faith and breach of statutory duty." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 37 LRRM 2274, 2281 (1955).

With respect to the conduct of officials of the Local Union, a summary of the uncontradicted testimony during the trial below proves highly instructive. At the time that the officials (Priddy and Atterbury) told the Dealers employees "they had nothing to worry about," the former were not aware that an arrangement had been made between the two companies (R. 47, 49, 57). It was rumored that Ford had "ordered" one of them to leave (R. 50). Under such circumstances, a "merger" or "absorption" within the meaning of Article 4, Section 5 was highly unlikely. The rumor was in fact fortified by statements of company officials that Ford "had seen fit to take the business from one carrier and give it to another carrier." (R. 47, 57). The initial step of this particular grievance of the E & L employees was in the hands of the Local Joint Committee, which had to defer on such matters of interpretation to the Joint Conference Committee by the express mandate of Article 7, Section 2(d) (R. 48-49, 55-56). When the matter reached the latter Committee, information of "absorption" came to light and Paul Priddy informed the Dealers shop stewards that his stand would be against their position (R. 56). Priddy withdrew from the panel (R. 50-51, 56, 58) and recommended to the Committee that seniority be dovetailed as between the two groups of employees (R. 57-58). He pointed out that E & L employees should be allowed to "follow their work" to Dealers and that the solution urged would, in the long run, aid the larger part of the working force (R. 57-58). On the other hand, said Priddy, if such arrangement were rejected, the E & L employees—most of whom had greater seniority than the Dealers employees—would either lose their jobs or go to the bottom of the list at Dealers, thus losing credit for many years of service within the multi-employer, multi-

local union bargaining unit (R. 57-59). Priddy testified that his position before the Committee was in no way motivated by prejudice for or against either faction of employees and that it would have been the same "had the other company been the successful one to stay." (R. 54-58).

The foregoing actions and words of the officials contain not the slightest suggestion of malice or bad faith. A comparable situation recently arose in the context of an intra-union dispute within the International Brotherhood of Electrical Workers. The International President was accused in the courts of having acted with malice when, upon a local's rejection of his instructions to desist from striking, he granted a charter to a newly-formed local in the same jurisdiction. The Fourth Circuit Court of Appeals rejected the allegation and rendered significant comment as to the President's duties as a union official:

> His duty was to 750,000 members, not merely to a few who might gain a short-range advantage that could prove costly to the parent body, the employers, the public and, in the long run, to the plaintiffs themselves."[44]

The facts of this case do not reveal any deviation from similar duties with which the Local Union officials had been entrusted.

The issue of whether Dealers employees, as a separate entity, enjoyed "representation" before the Detroit Committee is in any event both hollow and spurious. For it evolves from the unwarranted assumption that these employees or a "separate" representative of their choice had the right to appear before the Committee and participate in its decision-making process. Even the most ardent champions of individual rights under collective agreements have conceded that "the union has plenary power to make an agreement."[45]

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[44] *Parks* v. *IBEW*, 314 F2d 886, 906 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963).

[45] Summers, "Collective Power and Individual Rights In The Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L. J. 421, 440 (1963).

> [T]he employee has no standing to participate in thrashing out the interpretation of an existing employment standard to the extent that it purports to settle the future scope of a disputed existing right. Insofar as it operates prospectively, the interpretation of a standard, no less than its formulation, is within the exclusive province of the representative, for the interpretative process is a policy-making function which calls for the imagination and informed choice of available alternatives in construing an agreement. Whether the result is termed an interpretation or a change of the agreement, its essence is to imbue it with a new meaning to which the employees are bound in the future.[46]

In a significant, recent decision, the General Counsel of the NLRB declined to issue a complaint based upon an individual's charge that the contracting parties illegally failed to notify him of a pending meeting concerning his grievance (NLRB General Counsel Adm. Dec., Case No. SR-2364, CCH NLRB ¶11, 960 Dec. 3, 1962):

> [I]t does not appear from the legislative history of the 1947 amendments that Congress intended to make it an unfair labor practice for the contracting parties to exclude unit personnel from their grievance deliberations, particularly where the basic dispute involves a matter of contract interpretation. Accordingly, and absent any evidence of bad faith on the part of the company or union in the processing of the individual's grievance in the instant case, further proceedings herein were deemed unwarranted.

Moreover, the allegations of the complaint that the Dealers faction was not "represented" by Paul Priddy at the Detroit hearing, even if taken as true, do not constitute such facts as would be prejudicial to the plaintiffs. For the Dealers employees were represented in Detroit by three union shop stewards, who had been elected to their posts by the employees and who made the trip at the Union's expense (R. 36-40, 49, 54). These shop stewards, moreover, spoke up for their cause (R. 37-40, 51). There was no reason, on the facts presented, to reject the finding of the

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[46] Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 748 (1950).

trial court in the instant case that "there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented." (R. 18-19). *Cf. Local 149, Automobile Workers* v. *American Brake Shoe Co.*, 45 LRRM 2437 (W. D. Va. 1959), aff. 285 F2d 869; *Bailer* v. *Local 470, IBT*, 400 Pa. 188, 161 A2d 343 (1960); *Farris* v. *Alaska Airlines, Inc.*, 113 F. Supp. 907 (W. D. Wash. 1953).

VI

THE RESPONDENTS HAVE NO LEGAL STANDING TO QUESTION THE DECISION OF THE COMMITTEE ON THE GROUND THAT SUCH DECISION CONSTITUTED A BREACH OF CONTRACT.

Since, as heretofore demonstrated, "hostile discrimination" is not in issue before the Court, it is submitted that the Respondents (plaintiffs-appellants below) have no legal standing to bring into judicial question the decision rendered under the contract by the Joint Conference Committee. The proper approach to be adopted toward the question of "standing to sue" in Section 301 suits has been advanced by Professor Cox in these terms:

> In my opinion the needs of the industrial community would be served best by leaving management and union free to determine by the terms of their collective bargaining agreement what shall be the respective rights of the union and the individual in its administration. The law could fill any gap resulting from the parties' failure to manifest a reasonably clear intention by formulating presumptions based upon considerations of fairness and convenience mixed with an informed hunch as to the 'intent' of the transaction.
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> * * * * * *
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> Unless a contrary intention is manifest, the employer's obligations under a collective bargaining agreement which contains a grievance procedure controlled by the union

> shall be deemed to run solely to the union as the bargaining representative, to be administered by the union in accordance with its fiduciary duties to employees in the bargaining unit. The representative can enforce the claim. It can make reasonable, binding compromises. It is liable for breaches of trust in a suit by the employee beneficiaries."[47]

The opinion expressed by Professor Cox is shared by a considerable number of federal and state courts which have held that individual employees have no standing to compel arbitration, or to attack interpretative decisions of the contracting parties, where the right to do so had not been accorded them by the contract. *Black-Clawson Co., Inc.* v. *Machinists, Lodge 355*, 313 F2d 179 (2d Cir. 1962).[48] While this Court, in *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 9 L. Ed. 2d 246 (1962), concluded that Section 301 permitted the assertion of jurisdiction over individual suits, it expressly left open the issue of standing:

> The only part of the collective bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts. (at 251, note 9).

Therefore, the question of "standing" depends to a great degree on the language of the contract that had been approved by the individuals within the bargaining unit and to which they are all bound. Article 4, Section 5, which lies at the core of this proceeding, provides that "the seniority of the employees affected" by a merger or absorption of business "shall be determined by mutual agreement between

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[47] Cox, "Rights Under A Labor Agreement," 69 Harv. L. Rev. 601, 618-619 (1956).

[48] See also, *Parker* v. *Borock*, 182 NYS 2d 577, 148 N.E. 2d 324 (1959); *Cortez* v. *Ford Motor Co.*, 349 Mich. 108, 84 N.W. 2d 523 (1957); *U.S.* v. *Voges*, 124 F. Supp. 543 (E.D. N.Y. 1954); see other cases cited in Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L. J. 850, 855, Note 31 (1957).

the Employer and the Unions involved." (R. 10). Both that Section and Section 1 as well direct that "any controversy" over seniority be submitted to the joint grievance procedure set forth in Article 7 (R. 9-10). In Article 6, it is stated that "the Employers and the Union . . . shall together create" the Local Joint Committee and the Joint Conference Committee for the purpose of determining contract disputes (R. 10-11). There is no provision for employee participation in the creation of these committees. The Committees are to be composed of Employer and Union delegates only (R. 10-11) and meetings of such Committees "must" be attended by said delegates or their alternates (R. 11). From the first step of the grievance procedure (Article 7; R. 11-13) to the last, disputes are "taken up" between the Union and the Employer.[*] Again, no mention is made of employee participation. "It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, *whether requested by the Employer or the Union*, must be submitted to the . . . Joint Conference Committee (Art. 7, § 2(d); R. 12) (emphasis supplied). Any decision of said Committee "shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." (R. 12). Thus, the entire sense of the contract is to reserve to the contracting parties (the Union(s) and Employer(s) involved) the decision making process, whether in negotiating an agreement or administering it, while binding those parties *as well as the employees* to any resolution emanating from the procedure above outlined.

Where, as here, the contract clearly specifies that its implementation through the grievance procedure is to be reserved to the Union and the Employer alone, suits by individuals attacking the product of the grievance machinery should be excluded from the courts. While in some cases it may be deemed inappropriate to prohibit individual suits for the enforcement or recovery of certain individual

[*] In the *Smith* case, *supra*, the contract contained no grievance procedure (at 248, note 1).

contractual rights and privileges, this is not such a case. The area of dispute in this case is seniority, a creation of the collective agreement whose absence from individual contracts of hire is notable and whose main function is to govern the interrelationship of all employees within the unit. The problem requiring resolution through the grievance machinery was brought about by action taken by two companies, which had no special affect upon any one, two, or even several of the employees, but rather upon the whole body of employees of both companies.

It may not be contended that the adoption of this argument would deprive individuals of rights without which they could not protect their own interests. For individual employees may undoubtedly maintain suits against their representative when the latter hostilely discriminates against them. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).[50] They may maintain suits against their representative when wrongfully deprived of their internal union rights. *Gonzales* v. *Machinists*, 356 U.S. 617 (1958). They retain their right, under § 9 of the Labor Management Relations Act, "to present grievances to their employer and to have such grievances adjusted." (*supra*, p. 2). And, of course, individual employees continue to receive ample protection against wrongful conduct of both unions and employers under other provisions of the Labor Management Relations Act (29 U.S.C. 141, et seq.) and the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401, et seq).

The success of collective bargaining cannot stand impervious to an untrammeled right of individuals to sue. A uniform "common law" of the shop cannot persist in the face of individual suits which, by their very number and na-

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[50] Without necessarily agreeing with the NLRB, we note in this connection that the Board has recently devised a novel theory whereby arbitrary action by a union, even when unrelated to considerations of union membership, may be deemed an unfair labor practice under the Act. *Miranda Fuel Co.*, 140 NLRB No. 7 (1962); *Cf. NLRB* v. *Local 294, Teamsters*, 317 F2d 746 (2d Cir. 1963).

ture, invite divergent rulings both in the grievance process and in the courts. Individuals within the unit who, for one reason or another, stand opposed to the officials of the representative or complain over grievance decisions made by the contracting parties would be encouraged to flood the grievance machinery and the courts with unmeritorious claims and trivial grievances. The process of collective bargaining would then be faced with the irreconcilable force of individual bargaining, the latter creating discrimination and competition within the unit and seeking to transfer the collective process into the courts of law. The same force would, of course, discourage the adjustment of grievances by the Union at lower steps of the grievance procedure—for the responsibility of unions to feret out frivolous claims must collapse if the union is denied the power to effectively exercise it. Furthermore, individual suits claiming damage from action taken by the contracting parties in such areas as seniority, union shop, and check-offs are not likely to be characterized by a mature overview of the problems and needs of the entire bargaining unit which is so essential to the protection of all employees involved. This collective conscience, which the union is trained to employ, must be given full play if the selfish drives of individuals at the expense of group interests and aspirations are to be avoided, as they must.

These were some of the considerations emphasized by the Second Circuit Court of Appeals in the *Black-Clawson* case, *supra*, decided after this Court's decision in *Smith*:

> Our conclusion is dictated not merely by the terms of the collective bargaining structure, and history of Section 9 (a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer could harrass both the union and the employer by processing griev-

ances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union.

If employer and union deem it consonant with the efficient handling of labor disputes to repose power in the individual employee to compel the employer to arbitrate grievances, then they may do so, by incorporating such a provision in clear language in the collective bargaining agreement. They have not done so here. (at 186).

CONCLUSION

It is respectfully submitted that, for the reasons stated above, the decision of the court below should be reversed with directions that the permanent injunction outstanding against the contracting parties be dissolved in order to permit the immediate implementation of the award and decision of the Joint Conference Committee.

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